No. 187

In the Supreme Court of the United States

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

STATEMENT

By a treaty of 1854, the United States created a reservation for the Menominees, ceding to the tribe certain lands "to be held as Indian lands are held" (Pet. App. 39-40). In 1954 a "Termination Act" was enacted for the purpose of providing "for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin" (Pet. App. 41-43). In 1961, the Secretary of the Interior published a proclamation of ter-

mination which, under the Act, made State laws applicable to the Menominees "in the same manner as they apply to other citizens or persons within [the State's] jurisdiction." Thereafter, three Menominee Indians were charged with violating the State game laws, and the Supreme Court of Wisconsin held that, as a result of the Termination Act, the Indians were subject to such laws. *State* v. *Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41 (Pet. App. 58-69). When a petition for a writ of certiorari was filed, this Court requested the views of the Solicitor General (377 U.S. 920). In response, we stated our view that the result reached by the Wisconsin Supreme Court was correct. See Memorandum for the United States as Amicus Curiae in No. 930 October Term, 1963. While conceding that the decision of the Wisconsin Supreme Court would have a substantial economic impact on the members of the Menominee tribe, we expressed doubt as to how far the question would become the subject of future litigation. Certiorari was denied (377 U.S. 991).

Subsequently, the "Menominee Tribe of Indians" brought the instant litigation in the Court of Claims to recover compensation for the alleged taking of their right to hunt and fish free of State regulation. The majority of the Court of Claims concluded that the Termination Act had not abrogated the Tribe's hunting and fishing rights, and dismissed the complaint on the ground that the only interferences with the right to hunt and fish free of State regulation was by the State of Wisconsin, acting through its

Supreme Court and its law enforcement officers, not by the United States (Pet. App. 13-34, at 32). The majority suggested that a remedy might be available to the plaintiffs under the approach followed in *Moore* v. *United States*, 157 F. 2d 760 (C.A. 9).[1] Three judges dissented, expressing the view that the issue should be certified to this Court (Pet. App. 34-38).

DISCUSSION

1. It is not clear whether the Treaty of 1854 granted to the Menominee Indians, as a proprietary interest, any special right to hunt and fish on their lands free of State regulation.[2] To be sure, so long as the reservation remained under exclusive federal jurisdiction, State game laws would not apply. But it does not follow that this immunity was a property right that would survive the termination of federal supervision and of the Tribe's quasi-sovereignty over the territory. Indeed, the treaty does not expressly advert to hunting and fishing rights. On the other hand, as the Court of Claims emphasizes (Pet. 18-19), the lands selected for the reservation were chosen primarily because of the abundance of game—hunting

---

[1] That was a suit brought by the United States in its representative capacity to enjoin application of State game laws within the Quillayute Indian Reservation where there had been no termination of federal functions. Injunctive relief was obtained.

[2] Our memorandum in *Sanapaw* denied the grant of any such special rights. On reconsideration, however, we now view the question as less clear.

and fishing being an indispensable aspect of the Menominee way of life—and it may be that the absence of an express grant is not critical. At all events, however, we believe that any special right the Menominees may still enjoy to hunt and fish on their lands must yield to the extent reasonably necessary to promote the State's conservation and other related policies. Cf. *Tulee* v. *Washington*, 315 U.S. 681. Applying this standard, the result reached by the Wisconsin Supreme Court in *Sanapaw* seems correct on the facts of that case, because the regulations actually applied—prohibitions against hunting deer with the aid of an artificial light and transporting a loaded and uncased gun in an automobile—appear to be reasonably necessary conservation or safety measures.

2. Also difficult is the question whether a special tribal right to hunt and fish, if any, would persist after closing of the tribal roll, the distribution of the tribal property to the enrolled members and the end of tribal self-government—all apparently contemplated by the Menominee Termination Act. See 25 U.S.C. 893, 896, 897. That such a result is permissible is indicated by the otherwise similar Termination Act for the Klamath Tribe, which expressly provides that termination of federal supervision "shall [not] abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." 25 U.S.C. 564m(b). The absence of such a saving provision here may not be dispositive (see the conflicting views expressed in the congressional committee hearings, recited in the opinion of the

Wisconsin Supreme Court (Pet. 64-67)). Perhaps, in the case of the Menominees, the presently enrolled members alone would enjoy any proprietary tribal rights.

But, however that matter is resolved, it seems plain the United States cannot be held accountable in the present suit. Indeed—assuming the existence of special hunting and fishing rights—if those rights are now lost to the Menominees, it is not because the Treaty of 1854 has been repudiated, but, rather, as a mere consequence of the fact that the Tribe, the grantee, has ceased to exist. On the other hand, if the Tribe is viewed as continuing, or the tribal rights are deemed to have passed to the members, no taking has occurred. Accordingly, we believe the judgment of the Court of Claims is correct.

3. Although we believe that both the Wisconsin Supreme Court and the Court of Claims reached correct results, we recognize that the two courts are in fundamental disagreement as to the present status of the fishing and hunting rights of the Menominees, and, further, that both courts apparently reject our conclusion that no absolute immunity from State regulation was conferred on the Tribe, as a property right, by the Treaty of 1854. This Court is the obvious forum to resolve the existing conflict and uncertainty.[3] The question raised is an important

[3] The suggested suit in a federal district court for injunctive relief would encounter practical and policy obstacles. Granting such an injunction would fly squarely in the face of the Wisconsin Supreme Court's decision in *Sanapaw*. Moreover, it is doubtful whether the United States could initiate

one involving the proper construction of treaty and statutory provisions. Since termination of federal supervision over Indian tribes is a continuing policy of the federal government and since other termination statutes containing similar provisions have been enacted in recent years, resolution by this Court of the issues here presented may have a reach beyond the instant controversy. We, therefore, do not oppose the granting of the petition.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

---

such a suit since the termination of federal supervision over the property and members of the Tribe would seem also to terminate its capacity to bring suit on their behalf.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 271731 97